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No. 82-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONERS' REPLY BRIEF

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Pursuant to Rules 22.5 and 22.6 of this Court's Rules, petitioners submit this Reply to Respondents' Brief in Opposition to the Petition for Writ of Certiorari.

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH A RECENT DECISION OF THE NINTH CIRCUIT AND FAILS TO FOLLOW THIS COURT'S DECISIONS IN *AMERICAN PIPE* AND *TOMANIO*.

In its opinion of June 8, 1982,[1] the court below expressly recognized that if the rule stated in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), were

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[1] The decision of the court below, not reported at the time the Petition for Certiorari was filed, now appears at 681 F.2d 42 (1st Cir. 1982).

applied in the instant cases, all of the unnamed class members would be time-barred. Appendix, 14a. The court, however, refused to apply the rule, holding it inapplicable to class actions brought under 42 U.S.C. § 1983. Appendix, 17a.

Just over one month later, on July 14, 1982, the Court of Appeals for the Ninth Circuit reached exactly the opposite result on facts in all material respects identical to those in the instant cases. Thus, in *Pavlak* v. *Church*, 681 F.2d 617 (9th Cir. 1982), the Ninth Circuit, citing the "*need for procedural uniformity in all class actions in federal courts*," held that "the federal rule, not the state law, governs the tolling issue relevant here." 681 F.2d at 619; emphasis supplied. The "federal rule" applied by the court was the one established by this Court in *American Pipe*.[2]

In their Brief in Opposition at page 5, respondents argue that, in ignoring the rule of *American Pipe* and looking to the law of Puerto Rico instead, the court below "properly followed" this Court's decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980). Respondents, however, overlook the fact that in *Tomanio* there was no applicable federal rule. Indeed, this Court stated in

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[2] In the Petition for Writ of Certiorari at pp. 9-10 n. 10, petitioners cited the *Pavlak* case. At that time, however, only the summary of the decision appearing in the United States Law Week, which stressed a different aspect of the Ninth Circuit's holding, was available to petitioners. *See* 51 U.S.L.W. 2068 (August 3, 1982). Since then, however, petitioners have had an opportunity to review the full text of the decision, and such review has made clear that a direct conflict exists between *Pavlak* and the decision below. Under the provisions of Rule 22.6, therefore, petitioners call this important decision to this Court's attention.

Tomanio that, under 42 U.S.C. § 1988, federal courts must look to state law only "when federal law provides no rule of decision for actions brought under § 1983." 446 U.S. at 484-85; Petition for Certiorari at 11. *American Pipe* clearly provides the applicable "rule of decision" for class actions brought in federal courts. The Ninth Circuit correctly applied that rule. The contrary and conflicting decision of the court below should be corrected.[3]

Lastly, respondents attempt to dismiss *American Pipe* as merely "a judge-made tolling rule developed . . . for anti-trust actions." Brief in Opposition at 7. The court below distinguished *American Pipe* on similar grounds. Appendix, 17a. That position, however, flatly ignores this Court's statement in *American Pipe* that it was there concerned with "an aspect of the relationship between a statute of limitations and the provisions of Fed. Rule Civ. Proc. 23 regulating class actions in the federal courts," 414 U.S. at 540, and that the rule adopted was "the rule most consistent with federal class action procedure." *Id.*

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[3] There is simply no basis for respondents' statement that petitioners "in effect [ask] this Court to overrule" *Tomanio*. Brief in Opposition at 7. Indeed, even if *Tomanio* does not in fact *require* application of the federal rule of *American Pipe* to federal class actions brought under § 1983, it clearly does not require the application of state law in lieu thereof, nor does it prohibit use of the federal rule to promote procedural uniformity. In fact, in *Pavlak* v. *Church*, *supra*, the Ninth Circuit noted that "[t]he issue . . . [of] whether state or federal rules of limitation apply when the reason for tolling arises from federal procedural policy, was not raised or addressed in *Tomanio*." 681 F.2d at 619. Thus, as petitioners noted in their Petition for Certiorari at page 12 n. 12, should this Court perceive a need to reconcile its holdings in *American Pipe* and *Tomanio*, this case presents an appropriate vehicle for that purpose.

at 554. Furthermore, numerous courts have applied the rule of *American Pipe* as a rule of general applicability to class actions brought in federal court, including actions brought under 42 U.S.C § 1983. *See* cases cited in Petition for Certiorari, p. 9 n. 10. In fact, the narrow reading of *American Pipe* urged by respondents has never been adopted by any court, except the court below in its decision in these cases.[4]

II. THE PENDENT STATE CLAIMS CANNOT BE RELIED ON TO SUPPORT THE RESULT BELOW.

Respondents argue, for the first time in these lengthy proceedings, that their "pendent Puerto Rico statutory claims" are alone sufficient to support the result below. Brief in Opposition at 10-12. No authority is cited to support this novel argument, nor did the court below rest its decision on any such pendent claims; indeed, the argument was not even raised before the court below. In any event, it is clear that if respondents' claims under § 1983 were untimely when filed, and thus should have been dismissed, the pendent state claims should have been dismissed as well. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966); *Hupp* v. *Gray*, 500 F.2d 993, 998 (7th Cir. 1974) (where federal claim was time-barred, district court properly dismissed pendent state claims).

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[4] Respondents' attempt to justify that result by citing the Advisory Committee's Note on Proposed Rule 23 is indeed curious. Brief in Opposition at 7. The quoted language, purportedly drawn from this Court's decision in *American Pipe*, is incomplete, taken completely out of context, and grossly misleading. *See* 414 U.S. at 554 and n. 24.

III. RESPONDENTS HAVE FAILED TO RECONCILE THE DECISION BELOW AS TO THE TIMELINESS OF ORTIZ RIVERA'S CLASS ACTION COMPLAINT WITH THIS COURT'S DECISIONS IN *CHARDON* v. *FERNANDEZ* AND *DELAWARE STATE COLLEGE* v. *RICKS*.

Ortiz Rivera declared in a sworn statement filed with the District Court that he was notified on May 27, 1977, over a year before he filed his suit on June 19, 1978, that a final decision had been made not to renew his temporary appointment for the 1977-78 school year. Appendix, 81a-83a. The District Court, contrary to respondents' contention, did not find as a matter of *fact* that he did not receive notice on that date. Rather, it concluded, as a matter of *law*, that the notice he received on May 27, 1977, was not sufficient to start the statute of limitations running on his cause of action under § 1983. That conclusion, reached before this Court decided *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), and *Chardon* v. *Fernandez*, 454 U.S. 6 (1981), rested on the erroneous view that a cause of action under § 1983 does not accrue until the date the plaintiff "is *officially informed* that he is being demoted and he is aware of the reasons for [the] demotion." Appendix, 79a; emphasis supplied.

The court below not only upheld the result reached by the District Court, but expressly adopted its reasoning as well. Appendix, 5a. That reasoning cannot be squared with this Court's decisions in *Ricks* and *Fernandez*. In *Ricks*, this Court held that the limitations period commenced "at the time the tenure decision was made and communicated to Ricks." 449 U.S. at 258. Similarly, in *Fernandez*, this Court looked to the date respondents were "notified . . . that a final decision had been made to terminate their appointments," in determining the date on which their cause of action accrued. 454 U.S. at 8. In

light of those decisions, there is no basis for the court below to have rejected the notice Ortiz Rivera received from the School Superintendent on May 27, 1977, more than one year before his class suit was filed on June 19, 1978.

CONCLUSION

For these reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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